No. 4252

In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL, Plaintiffs in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

Writ of Error to the United States District Court of the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of Defendant in Error

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STATEMENT OF THE CASE

In the afternoon of July 5, 1923, Agent J. A. Simmons went to 201½ Second Avenue and bought three drinks of liquor from Lottie Powell, paying fifty (50c) cents each. About nine o'clock on the

same day Agent Simmons returned with Mr. Whitney when they were admitted by Vera Harper, and okehed by Lottie Powell, and were shown into the serving room. They bought liquor, which was brought into the room by Lottie Powell and served by Vera Harper, and while they were there Vera Harper ordered a bottle over the phone. After the bottle came Whitney ordered, Lottie went and brought back the liquor and served it. On July 6th about five-thirty Mr. Whitney and Agent Simmons returned to the Star Rooms and were admitted by Lottie Powell and the four of them had a drink, Vera Harper serving the drinks. While they were drinking Mrs. Scribner came in and was invited to have a drink, but said no, that she had been sick for the last few days, but that the girls would look after them, and that she, Mrs. Scribner, was the proprietress of the place. The two girls and Mrs. Scribner were then arrested and Mrs. Scribner told the officers not to take the girls that she was the proprietress of the place and that they were working for her, and that they were inmates of the place. They searched the place and one of the officers started to pry open a desk and Mrs. Scribner said, "Don't do that, I have a key," and upon searching the desk marked money was found.

Mr. Whitney testified that he took his wife with him and that she called various parties over the phone, using the name of Alice, and that liquor was purchased from four or five different concerns. Mr. Whitney also testified that he arrested Mr. Scribner on the third floor of the Star Rooms in the living quarters of himself and Mrs. Scribner, and, in this room where Mr. Scribner was arrested, a bottle of intoxicating liquor was found on the wash stand with a serving glass beside it. In the bottom of the wash stand were found two or more empty bonded liquor flasks.

Mr. Justi testified that he searched the kitchen and found in the ice box one bottle of beer, and that he knew nothing about the rest of the premises.

Scribner testified he lived there with his wife, and that she handled all the money for the family.

ARGUMENT.

Assignment I

It is contended that the evidence is insufficient to convict the defendant, William Scribner, under the counts the jury found him guilty of on the theory that the acts of the defendants Lottie Powell

and Vera Harper cannot be imputed to him through his wife. The facts show that Scribner lived upon the premises; that he received money from the maintaining of the premises; that he was arrested in a room where intoxicating liquor was found; that he was the husband of Mrs. Scribner who was present when a part of the liquor was drunk; that intoxicating liquor was ordered over the phone from this place from four or five different concerns under the name of "Alice" and was delivered there. There was testimony that Mrs. Scribner handled all the money as she was the best manager.

The evidence as a whole clearly establishes the character of the premises. In view of such evidence it was a question for the jury as to his (Mr. Scribner's) connection with the place. Of course, the evidence is circumstantial but in view of the character of the premises and the conduct of the parties upon it, it is reasonably a question for the jury against the defendant, Scribner.

Ferry v. U. S. and four other cases, 292 Fed. 583, 3 C.

In the above case the defendant was convicted of maintaining a nuisance for the sale of intoxicating liquor by a bar tender in the absence of defendant

Ferry, and commenting upon the case, the court said:

"So viewing the case, we are of the opinion the court, in the light of the evidence, committed no error in sending the case to a jury, instead of directing them as a matter of law to find Ferry not guilty; for, if such was the law all a violator need do would be to furnish the premises, the illegal liquor, and the equipment for doing business, and keep out of sight, when the barkeeper was doing what the proprietor of the place wanted, meant, and placed him there to do, for truly the law is not so blind to the real state of things as to allow any such course of conduct to prevail."

Parks v. U. S., 297 Fed. 834.

In the above case T. W. Parks and Emma Parks were husband and wife and were charged with the unlawful possession of certain intoxicating liquors. T. W. Parks, the husband, was absent from the premises when the search was made. The wife testified that the liquor was hers; THAT THE PREMISES BELONGED TO HER; that her husband knew nothing of the traps and whiskey and that she had the liquor for her own use and served it at parties given to her friends. T. W. Parks also testified that he knew nothing of the liquor. The court issued a verdict affecting both of them and in commenting upon the case said:

"The finding of intoxicating liquors concealed in cement traps was evidence from which the jury could infer the guilt of the husband. Such traps are not usually made by women to conceal liquor from their husbands. . . . . The jury was at liberty to accept all or any part of the testimony of the defendants."

Assignment II

The evidence shows that the witness, Whitney, testified that:

"After we got inside she stopped to talk to us in the hallway and just as we started the conversation Lottie Powell came out of one of the SERVING ROOMS (that is one of the rooms where they had been served liquor) along this long hallway and said: 'Oh, they are all right.' Then they took us down to the room furthest north, which is in the northeast corner. We entered this room, the bell rings if you go up and if you open the door it rings a bell and some of these women come out and meet you. There are four serving rooms along there. Right alongside of this hallway."

After that counsel for the government asked the witness to describe the rooms. Counsel for the defense objected to the description of the rooms, and moved the court to strike the testimony about the serving room, to which no objection had been made, and the court refused, but instructed the

jury at this point, before the case had gone any further:

"I will say in this connection that the jury will not be bound by his conclusions as to what the rooms were. He is simply defining the rooms. Let the jury conclude what they are used for."

Nothing was asked the witness upon cross-examination by counsel for the defense about the rooms and the motion was not renewed.

Wigmore, volume I, section 559.
Kinser v. U. S., 231 Fed. 556 Ct. 558.

It is plain to be seen that no rule of evidence has been violated, and the defendant's rights were not prejudiced. If the witness had said: "We went through the kitchen, dining room or hallway" he would have been stating just as much a conclusion as when he said "serving room." The witnesses had been served intoxicating liquor in these rooms. They described the rooms and it is plain to be seen from the character of the place that the rooms were used for nothing more than serving rooms.

The evidence shows that upon the entrance to the premises a bell rang upstairs and one of the girls met the visitors in the hall and invited them into the rooms. The jury had all of this evidence before them and under the instructions of the court could

judge for themselves what the rooms were used for.

Section 1246 C. S. 1923 Sup.

Assignment III

It is contended that the court erred in directing the cross-examination of the witness Justi. (Tr. p. 87-89.)

Testimony of Walter M. Justi, for the Government

Walter M. Justi, a witness produced on behalf of the government, being duly sworn, testified as follows:

Direct examination (By Mr. McKinney):

"Q. You are a federal prohibition agent, Mr. Justi?

"A. Yes.

"Q. How long have you been in that service?

"A. Over two years.

"Q. Did you have occasion on the night of July 6th to visit 201½ Second Avenue South, the premises known as the Star Rooms?

"A. Yes.

"Q. Did you assist in searching that building?

"A. Yes.

"Q. I show you government's exhibit No. 10 for identification. Did you ever see that before? And if you know what it is state to the jury.

"A. That is the bottle of beer I found in the icebox in the kitchen on the upper floor.

"Q. On what floor, the first, second or third?

"A. The third floor."

Cross-examination (By Mr. Beeler):

"Q. Is that all you found there, this bottle of beer? (61.)

"A. Yes, that is all I found, there.

"Q. You made a very exhaustive search, did you?

"A. I looked through the kitchen thoroughly and looked through the pantry.

"Q. Did you make an exhaustive and careful search?

"A. Yes, I believe I did.

"Q. I want to find out whether your search was complete all over the house?

"A. Not all over the house, no.

"Q. Did you look in the drawers and under the beds and all over the place for liquor?

"A. No, sir.

"Q. Where did you look?

"A. In the kitchen.

"Q. Only the kitchen?

"A. Yes.

"Q. That was the only place?

"A. That was the only place that I looked.

"Q. On what floor was that?

"A. On the third floor.

"Q. What time of night did you make this search?

"A. I do not recall exactly, but somewhere, I would imagine about 6:30 o'clock or 6:00.

"Q. Who was upstairs at the time you searched this place?

"A. No one.

"Q. Were you there alone?

"A. You mean the occupants of the house?

"Q. Were you there alone in the kitchen?

"A. No. Agent Whitney came in just about the time I opened the icebox.

"Q. Was anybody there besides you and Whitney?

"A. No, not when I found the beer.

"Q. Did you see the defendant, Mr. Scribner?

"A. Yes.

"Q. Was he up in his room or was he downstairs?

"A. He was on the second floor.

"Q. Who accompanied you down to the Star Hotel?

"MR. MCKINNEY: I object to that as not proper cross-examination.

"THE COURT: Objection sustained.

"Q. One more question, Mr. Justi. Was Mr. Simmons upstairs with Mr. Whitney?

"MR. MCKINNEY: I object to that.

"THE COURT: Objection sustained. He has already answered that question.

"MR. BEELER: Exception.

"Q. Was Mr. Whitney the only one that was with you?

"MR. MCKINNEY: I object for the same reason.

"THE COURT: He has answered the question before.

"MR. BEELER: Exception."

The witnesses, Simmons and Whitney, had previously testified, in referring to the find upstairs, of the arrest of the defendant Scribner. It was contended that there was a discrepancy between their testimony in referring to the time and manner in which they went upstairs. It is plain to be seen from the evidence in the cross-examination of Justi that counsel for the defense was trying to discredit the evidence of two other government wit-

nesses by Justi, upon matters that he had not testified to on direct examination. The witness had not been called by the defense and was still a government witness and under the most liberal rulings of cross-examination the defense had no right to cross-examine Justi upon matters that he had not testified to. There was no effort made to discredit the witness Justi but the purpose was to discredit the testimony of the other two witnesses' cross-examination. Cross-examination, as I understand it, is for the purpose of testing the truthfulness, candor, intelligence, memory, bias, or interest of the witness, and any question to that end, within reason, is usually allowed, and anything beyond that is a matter of discretion with the court.

Thompson v. U. S., 144 Fed. 14.

Wigmore on Evidence, volume II, page 1709.

The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error.

Heard v. U. S., 255 Fed. 829 at 833,

and the cases cited therein.

Camp Mfg. Co. v. Beck, 283 Fed. 705.

Assignment V

It is contended that because the jury found the defendants guilty of sale and possession and returned the verdict of not guilty on the nuisance count that it was error as being an inconsistent verdict. It is plain to be seen that the crimes charged were separate and distinct crimes, not inclusive, as there was evidence for the jury to find them guilty on the fourth count, and it is plain to be seen that the verdict was a compromised verdict. The court has passed upon this question twice and sustained it.

Carrigan v. U. S., 290 Fed. 190.
U. S. v. Bilboa, 287 Fed. 125.
Woods v. U. S., 290 Fed. 957.
Marshallo v. U. S., 298 Fed. 74.
Corbin v. U. S., 205 Fed. 278.
Ferry v. U. S., 292 Fed. 283.

The court instructed the jury upon the facts, that if they did not believe that a nuisance was maintained there, that it was not a question for the discretion of the court but for that body of men.

In *U. S. v. Carrigan, supra*, the court said:

"A verdict that is apparently inconsistent affords no basis for reversal of a judgment predicated thereon, when the evidence is sufficient to support either of two separate offenses."

Respectfully submitted,

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